

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

In the Matter of:)
) Whatcom Waterway
) RI/FS
Whatcom Waterway)
)
Bellingham, Washington) **AGREED ORDER**
)
)
) No. DE 95TC-N399
)
)
TO: Georgia-Pacific Corporation)
)
133 Peachtree Street, N.E.)
)
P.O. Box 105605)
)
Atlanta, Georgia 30348-5605)

I.

Introduction

A. In entering into this Agreed Order (Order), the mutual objective of the Washington State Department of Ecology (Ecology) and Georgia-Pacific Corporation (G.P.) is to provide for a Remedial Investigation/Feasibility Study (RI/FS) at a site where there has been a release or threatened release of a hazardous substance. Pursuant to this Order G.P. agrees to perform a State Remedial Investigation/Feasibility Study (RI/FS) of the Whatcom Waterway Site as identified and defined in Section VI.1.A of this Order (the Site) pursuant to WAC 173-340.

II.

Jurisdiction

Ecology is issuing this Agreed Order ("Order") pursuant to its authority under RCW 70.105D.050(1).

III.

Findings of Fact

Ecology makes the following Findings of Fact, without admission of such facts by G.P.:

1. G.P. has owned and operated a pulp and paper mill in Bellingham, Washington, located directly adjacent to the Site, since the 1960's.

2. From 1965 through 1979, G.P. discharged wastewater containing mercury to the Site from G.P.'s chlor-alkali plant located at its pulp and paper mill.

3. Sampling of marine sediments at the Site has occurred at various times since the 1970's. Such sampling indicated the presence of mercury above Sediment Quality Standards as defined in the Sediment Management Standards, WAC 173-204.

4. These facts are documented in Ecology files, Whatcom Waterway/SIT2.3.3 - SIT2.3.7, SIT2.3.10 and SIT2.3.11.

IV.

Washington State Department of Ecology Determinations

1. G.P. is an "owner or operator" as defined at RCW 70.105D.020(11) of a portion of the Site.

2. G.P. is a "generator" as defined at RCW 70.105D.040(1)(c).

3. The Site is known as Whatcom Waterway and is located in Bellingham, Washington. The Site is described more fully in Section VI.1.A. of this Agreed Order. The Site is a "facility" as defined in RCW 70.105D.020(4).

4. The mercury found at the Site as described above is a "hazardous substance" as defined at RCW 70.105D.020(7).

5. Based on the presence of this hazardous substance at the facility and all factors known to Ecology, there has been a release or threatened release of a hazardous substance to the Site, as defined at RCW 70.105D.020(19).

6. By letter dated March 6, 1995, Ecology notified G.P. of its status as a "potentially liable person" for the Site under RCW 70.105D.040 after notice and opportunity for comment.

7. Pursuant to RCW 70.105D.030(1) and RCW 70.105D.050 Ecology reserves the authority to require potentially liable persons to investigate or conduct other remedial actions under subsequent decrees or orders with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.

8. Based on the foregoing facts, Ecology believes the RI/FS required by this Order is necessary to protect public health and the environment, and is in the public interest.

V.

Work To Be Performed

Based on the foregoing Facts and Determinations, Ecology and G.P. agree that G.P. will take the following remedial actions and that these actions will be conducted in accordance with WAC 173-340 and this Order unless otherwise specifically provided for herein:

1. Conduct a State Remedial Investigation/Feasibility Study (RI/FS) of Whatcom Waterway and prepare reports compiling results of the investigation and study. The RI/FS and reports shall be conducted and prepared in accordance with WAC 173-340, WAC 173-204, and Ecology's Sediment Cleanup Standards User Manual (as updated).

2. The RI/FS shall be conducted in accordance with the Whatcom Waterway Scope of Work attached as Exhibit A and hereby incorporated by reference as an enforceable part of this Agreed Order.

3. Ecology has the right to comment on, modify, and direct changes for all deliverables. At Ecology's discretion, G.P. shall fully correct all deficiencies and incorporate and integrate all information and comments supplied in writing by Ecology either in subsequent or resubmitted deliverables. For each and every deliverable, report, memorandum, plan or other item required under this Order, if Ecology in writing disapproves or requires modification or revision of any deliverable, report, memorandum, plan or other item, in whole or in part, G.P. shall

submit a modified or revised version thereof to Ecology which is responsive to all Ecology directions, comments, or requirements within forty-five (45) days after receiving such directions, comments or requirements in writing from Ecology, unless a shorter or longer time is agreed to by G.P. and Ecology.

4. It is Ecology's intent to submit comments on deliverables to G.P. within forty-five (45) days of receipt of the deliverables unless Ecology determines a longer time is needed. If circumstances beyond Ecology's control prevent Ecology from submitting comments within the time period originally established, Ecology will notify G.P. of that fact within that time period, and will inform G.P. of the date by which Ecology anticipates submitting its comments to G.P. The absence of express Ecology comment, approval or disapproval of any submission within any specified time period shall not be construed as approval by Ecology.

5. Except where necessary to abate an emergency situation, G.P. shall not perform any remedial actions at Whatcom Waterway outside that required by this Order unless Ecology concurs, in writing, with such additional action.

6. At any time during RI/FS activities, if additional studies under WAC 173-340 or WAC 173-204 are deemed necessary by Ecology or G.P. to complete the RI/FS, Ecology and G.P. shall attempt to reach agreement as to the need for the studies. If agreement is reached, G.P. shall consult with Ecology, prepare planning documents subject to Ecology approval, and implement the approved plans. G.P. and Ecology shall identify the need for such studies as soon as possible to avoid project delays. If additional studies constitute a substantial change to the Order, then additional public notice and opportunity to comment shall be provided.

If G.P. does not agree to perform additional studies requested by Ecology, Ecology reserves all rights under MTCA or other laws to require G.P. to perform the studies.

VI.

Terms and Conditions of Order1. Definitions

Except for as specified herein, all definitions in WAC 173-340-200 apply to the terms in this Order.

A. Site: The Site, referred to as Whatcom Waterway, is located in Bellingham, Washington. It is generally located in the west half of Section 30, Township 38 North, Range 3 East and in Sections 25 and 36, Township 38 North, Range 2 East, Willamette Baseline and Meridian. The approximate Site boundary is depicted in Exhibit B to this Order and extends vertically and laterally to any place where hazardous substances have come to be located.

B. Agreed Order or Order: Refers to this Agreed Order and each of the exhibits to the Order. Exhibits A and B are integral parts of and are incorporated into this Order by reference.

C. Potentially Liable Person (PLP): For the purposes of this Order only, the terms Potentially Liable Person and PLP refer to G.P.

2. Public Notices

WAC 173-340-600(10)(c) requires a 30-day public comment period before this agreed order on a state RI/FS becomes effective. Ecology shall be responsible for providing such public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that the Order is inadequate or improper in any respect. Ecology agrees to provide notice and an opportunity to comment to G.P. prior to modifying or withdrawing any provision of this Order. G.P. reserves the right to withdraw from the Agreed Order at G.P.'s discretion if G.P. objects to any such modification or withdrawal by Ecology. If G.P. withdraws from the Agreed Order, Ecology reserves all rights under MTCA or other laws to require G.P. to conduct remedial actions at the Site.

3. Remedial Action Costs

G.P. shall pay to Ecology costs incurred by Ecology pursuant to this Order. These costs shall include work performed by Ecology or its contractors for investigations, remedial actions, and Order preparation, oversight and administration. Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). G.P. shall pay the required amount within 90 days of receiving from Ecology an itemized statement of costs that includes a description of work performed, a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. Itemized statements shall be prepared quarterly. Failure to pay Ecology's costs within 90 days of receipt of the itemized statement of costs will result in interest charges.

By signing this Agreed Order, G.P. does not agree to pay for time spent by a private consultant hired by Ecology to review the work of G.P.'s consultant. Ecology reserves the right to require payment of those costs from G.P. through any legal means available should Ecology incur such costs.

4. Designated Project Coordinators

The project coordinator for Ecology is:

Name: Lucille T. Pebles
Address: Department of Ecology
3190 160th Avenue SE
Bellevue, Washington 98008-5452
Telephone: (206) 649-7272
FAX: (206) 649-7098

The project coordinator for G.P. is:

Name: John Andersen
Address: Georgia-Pacific West
300 W. Laurel Street
Bellingham, WA 98225-5593

Telephone: (360) 676-7208
FAX: (360) 676-7247

The project coordinators shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and G.P., and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinators. Should Ecology or G.P. change project coordinators, written notification shall be provided to Ecology or G.P. at least ten (10) calendar days prior to the change.

5. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer, hydrogeologist or marine sediment expert with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. G.P. shall notify Ecology as to the identity of such engineer, hydrogeologist or expert, and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

G.P. shall provide a copy of this Order to all agents, contractors and subcontractors retained to perform work required by this Order and shall ensure that all work undertaken by such agents, contractors and subcontractors will be in compliance with this Order.

6. Access

Ecology or any Ecology authorized representative shall have the authority to enter and freely move about the Site and other property owned or controlled by G.P. that is subject to source control and recontamination evaluation under Task 4.6 of Exhibit A at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by G.P. By signing this Agreed Order, G.P. agrees to allow access to the

upland and aquatic portions of the Site owned or controlled by G.P. and to any other property owned or controlled by G.P. that is subject to source control and recontamination evaluation under

Task 4.6 of Exhibit A, at all reasonable times for the purposes of overseeing work performed under this Order.

Unless an emergency prevents such notice, Ecology agrees that it will provide twenty-four (24) hours notice before entering any property owned or controlled by G.P. that is described in the preceding paragraph, and will notify G.P.'s project coordinator or a G.P. representative immediately prior to entering any such property. G.P. does not agree, by entering into this Agreed Order, to allow access to any G.P. owned or controlled property not described in this section of the Order.

G.P. shall make a good faith effort to obtain access to the portions of the Site not owned by G.P. for the purpose of conducting the remedial actions required under this Order. If, after making such efforts, G.P. is unable to obtain access, G.P. shall notify Ecology immediately.

Ecology and G.P. each shall allow split or replicate samples to be taken by the other and shall provide seven (7) days notice before any sampling activity.

7. Public Participation

Public participation will be accomplished by implementing a Whatcom Waterway Public Participation Plan. Ecology shall maintain the responsibility for public participation at the Site in accordance with WAC 173-340-600(8)(g). G.P. shall help coordinate and implement public participation for the Site as required by Ecology.

8. Retention of Records

G.P. shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data, or the electronic equivalent, in its possession relevant to this Order.

Should any portion of the work performed hereunder be undertaken through contractors or agents of G.P., then G.P. agrees to include in its contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution

G.P. reserves the right to invoke dispute resolution to resolve disputes which may arise during the implementation of this Order. Such request shall be in writing and directed to Ecology's signatory, or his/her successor(s), to this Order. Ecology resolution of the dispute shall be binding and final. G.P. is not relieved of any requirement of this Order during the pendency of the dispute and remains responsible for timely compliance with the terms of the Order unless otherwise provided by Ecology in writing.

10. Reservation of Rights/No Settlement

This Agreed Order is not a settlement under RCW 70.105D. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against G.P. to recover remedial action costs paid to and received by Ecology under this Agreed Order. In addition, Ecology will not take additional enforcement actions against G.P. to require those remedial actions required by this Agreed Order, provided G.P. complies with this Agreed Order.

Ecology reserves the right, however, to require additional remedial actions at the Site should it deem such actions necessary. G.P. reserves the right to reject or refuse to perform additional remedial actions not required by this Agreed Order.

By entering into this Order, G.P. makes no admission of liability nor does it waive any right, claim, remedy, appeal, cause of action, or defense, except as specifically described herein. By signing this Agreed Order, G.P. agrees to comply with all terms of and perform all work required under this Order.

Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances to Whatcom Waterway.

In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order G.P. to stop further implementation of this Order for such period of time as needed to abate the danger.

11. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by G.P. without provision for continued implementation of all requirements of this Order.

Prior to transfer of any legal or equitable interest G.P. may have in the Site or any portions thereof, G.P. shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, G.P. shall notify Ecology of the contemplated transfer.

12. Compliance With Other Applicable Laws

A. All actions carried out by G.P. pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B of this section.

B. Pursuant to RCW 70.105D.090(1), the substantive requirements of RCW 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 and of any laws requiring or authorizing local government permits or approvals for the work to be performed under this Order that are known to be applicable at the time of issuance of the Order have been included in the Scope of Work, Exhibit A, and are binding and enforceable requirements of the Order.

G.P. has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the work to be performed under this Order. In the event G.P. determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the work to be performed under this Order, it shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or G.P. shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, G.P. shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the work to be performed under this Order. Ecology shall make the final determination on the additional substantive requirements that must be met by G.P. and on how G.P. must meet those requirements, after consultation with G.P. Ecology shall inform G.P. in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. G.P. shall not begin or continue the work potentially subject to the additional requirements until Ecology makes its final determination.

Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and G.P. shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

13. Revisions to Scope of Work and Schedule

Requests by G.P. for revisions to the Scope of Work shall be documented with written justification for the change and provided to Ecology for approval before implementing the change. A revision of the schedule shall be granted only for such period as Ecology determines is reasonable under the circumstances.

A requested revision shall not become effective until approved by Ecology in writing.

The burden shall be on G.P. to demonstrate to the satisfaction of Ecology that good cause exists for granting a revision. Good cause includes, but is not limited to:

1. Circumstances entirely beyond the control and despite the due diligence of G.P. such as difficulty in obtaining access to property not owned by G.P.;

2. Acts of God, including fire, flood, blizzard, extreme temperatures, storm, earthquake, wave or water conditions, strikes, or other labor disputes or other unavoidable casualty.

However, neither increased costs of performance of the terms of this Order, nor changed economic circumstances, nor unavailability of qualified personnel to perform work pursuant to this Order, nor internal G.P. delays shall be considered good cause for granting a revision. Any disagreement regarding requested changes shall be resolved following the dispute resolution process stated in this Order.

VII.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon G.P.'s receipt of written notification from Ecology that G.P. has completed the RI/FS required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VIII.

Enforcement

1. Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

A. The Attorney General may bring an action to enforce this Order in a state or federal court.

B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.

C. In the event G.P. refuses, without sufficient cause, to comply with any term of this Order, G.P. will be liable for:

- (1) up to three times the amount of any costs incurred by the State of Washington as a result of its refusal to comply; and
- (2) civil penalties of up to \$25,000 per day for each day it refuses to comply.

D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order: January 2, 1996

GEORGIA-PACIFIC CORPORATION

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY

By James W. Cunningham
James Cunningham
General Manager
Georgia-Pacific West

By Michael J. Gallagher
Michael J. Gallagher
Section Manager, Toxics
Cleanup Program, Northwest
Regional Office

Date December 21, 1995

Date January 2, 1996